In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1408

DANDO ENTERPRISES, LTD.,
Petitioner,

vs.

JOSEPH H. PRITCHETT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

TABLE OF CASES

STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. _____

IN THE MATTER OF THE COMPLAINT OF RECREATION UNLIMITED, INC. (NOW DANDO ENTERPRISES, LTD.), OWNER OF A 1971 CLASSIC 170 MOTORBOAT NO. 17071681, MISSOURI REGISTRY NO. MO 4164 GG, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Dando Enterprises, Ltd., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on December 7, 1977 as modified by that Court's Order dated January 30, 1978.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 568 F.2d 570 (8th Cir. 1978) and is printed in Appendix A hereto, infra, page A-1.

The Memorandum Opinion and Judgment of the United States District Court for the Western District of Missouri, Southern Division, is unreported but is printed in Appendix B hereto, infra, page B-1. The Judgment of the United States District Court for the Western District of Missouri, Southern Division, is printed in Appendix B hereto, infra, page B-19.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A, infra, page A-1) was entered on December 7, 1977. A timely Petition for Rehearing resulted in that Court's Order of January 30, 1978 (Appendix A, infra, page A-27). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Whether the decision of the United States Court of Appeals is in conflict with a decision of this Court on the same subject in that it denied the petition for limitation of liability, without a search within the managerial hierarchy of the corporate vessel owner for actual knowledge or privity, as required by *Coryell* v. *Phipps*, 317 U.S. 406, 68 S. Ct. 291, 87 L. Ed. 363 (1943).

II

Whether the decision of the United States Court of Appeals is in conflict with decisions of this Court and other circuits of the United States Courts of Appeals in

that it denied a vessel owner's petition for limitation of liability pursuant to 46 U.S.C. §183(a), without a finding concerning the privity or knowledge of the owner of the vessel, but based solely upon the finding that the owner was engaged in a joint enterprise with the party who negligently entrusted the vessel to a youthful and inexperienced operator.

III

Whether the decision is in conflict with the decisions of this Court and other circuits of the United States Court of Appeals in that it determined that a joint enterprise between the owner of a vessel and another who negligently entrusted that vessel to a youthful and inexperienced operator would, standing alone, supply the "privity or knowledge" required to deny the owner's petition for limitation of liability under 46 U.S.C. §183(a).

STATUTORY PROVISIONS

This case involves 46 U.S.C. §183(a) which provides:

"The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in sub-section (b) of this Section, exceed the amount or value of the interest in such owner in such vessel, and her freight then pending."

STATEMENT OF THE CASE

A. The Facts

This matter arises out of the collision of two motorboats on August 7, 1971 on Lake Table Rock in Stone County, Missouri. This lake was formed of the damming of the James River, a navigable waterway. Both boats involved in the accident were docked at the Kimberling Cove Marina. One of the boats was a 17 foot Yellow Classic, operated by Scott Clifton, and the other boat was a 16 foot inboard-outboard operated by Margaret Ann Pritchett. At the time of the accident each boat was occupied by four persons.

The accident occurred shortly after dark. The boat operated by Clifton was returning to the marina and the Pritchett boat, having left the marina, was headed for the main body of the Lake. The boats approached each other on a collision course. Upon impact, the bow of the Clifton boat cut through the Pritchett boat. As a result of the accident, Margaret Ann Pritchett received serious and disabling injuries. Mike Oldham, a passenger in the Pritchett boat, was also injured.

Kimberling Cove, Inc. operated a marina on the shoreline of Lake Table Rock. The marina activities of Kimberling Cove, Inc. included the storage of private boats, boat repair facilities, a public fuel dock and the rental of pleasure boats, including the Yellow Classic 17 foot motorboat operated by Scott Clifton on the night of the accident. Several dockhands were employed at the marina during the summer of 1971, including Scott Clifton. His duties included opening and closing the marina, fueling and renting boats, selling merchandise, providing cus-

tomers with diverse services, instructing them in the operation of rental boats and moving the boats to cover in the event of a storm or catastrophy. He was regularly responsible for locking up the dockhouse at night. The dockhouse was located on the fuel dock and contained the keys to all boats located at the marina, including the rental boats. To perform these duties, Scott Clifton, as well as the other dockhands employed by Kimberling Cove, Inc., were given a set of keys to the marina facilities, including the dockhouse, and thus had access to all keys to the boats docked at the marina.

As a fringe benefit dockhands were allowed to use the rental boats without paying rental charges; but the policy of Kimberling Cove was to require permission, usually from the marina manager, John Hillman, before such use. On the evening of the accident, Scott Clifton, without permission, used his key to the dockhouse to obtain the keys to the Classic motorboat and removed the boat from its slip next to the fuel dock.

The Yellow Classic boat involved in this accident was owned by Petitioner, Dando Enterprises, Inc. (which at the time of the collision was known as Recreation Unlimited, Inc.) It was furnished to Kimberling Cove, Inc. for rental to the public under an arrangement in which the rental proceeds were divided, 40% to Recreation Unlimited, Inc. and 60% to Kimberling Cove, Inc. There were four boats in this rental agreement including the Classic involved in the accident. Although these were being rented to the public by Kimberling Cove, Inc., these boats, nevertheless, remained in the inventory of Recreation Unlimited, Inc. and were available for demonstration and sale by Recreation. Recreation had no control over the boat rental operations of Kimberling nor over the boats themselves other than to remove a boat from rental service if sold.

Charles J. Dando and his wife were the majority stockholders in Kimberling Cove, Inc. and the sole stockholders in Recreation Unlimited, Inc. Frank Clifton, father of Scott Clifton, was a vice-president in both corporations, but solely on the payroll of Recreation Unlimited, Inc. His duties were to supervise the day to day operations of Recreation Unlimited, Inc. He did, however, oversee the manager of the marina, John Hillman, whenever Dando, the president of Kimberling Cove, Inc., was absent. At all times pertinent, the marina manager was John Hillman, an employee of Kimberling Cove, Inc.

B. The Proceedings

On September 16, 1971, Civil Action No. 2792 was filed by Mr. and Mrs. Joseph Pritchett for derivative damages arising out of the personal injuries suffered by their minor daughter, Margaret Ann Pritchett, in the collision of the motorboats.

Within the time pe[illegible]ed by 46 U.S.C. §183(a), Recreation Unlimited, Inc. petitioned the United States District Court for the Western District of Missouri for limitation of liability within the provisions of 46 U.S.C. §183(a) in Civil Action No. 3122. With its Petition, Recreation Unlimited, Inc. tendered into the Court $3,500.00, the stipulated value of the Classic boat. Mike Oldham, a minor passenger in the Pritchett boat, and his parents filed an Answer and claim for damages resulting from personal injuries, alleging negligent entrustment by Recreation to Scott Clifton. Oldham's parents also filed a claim for their derivative damages. Margaret Ann Pritchett filed an Answer-Counterclaim alleging a number of grounds of active negligence on Recreation's part. Her parents filed a similar Answer-Counterclaim.

On June 3, 1975, Civil Action No. 75 CV 341-S was filed by Margaret Ann Pritchett for her personal injuries suffered in the motorboat collision.

All three actions were consolidated and the trial was to the Court without a jury. In Civil Action No. 2792 and No. 75 CV 341-S, Scott Clifton, the minor operator of the motorboat owned by Recreation Unlimited, Inc., was dismissed as a defendant; the remaining defendants being Kimberling Cove, Inc. (the marina operator and the renter of the motorboat owned by Recreation Unlimited, Inc.), Recreation Unlimited, Inc. and Charles J. Dando (holder of the government lease of the property on which both Kimberling Cove, Inc. and Recreation Unlimited, Inc. were located).

On August 19, 1976 the District Court filed its Memorandum Opinion and Judgment entering its Final Judgment on September 16, 1976. The Court found that Kimberling Cove negligently entrusted the boat to Scott Clifton, and judgments were entered against the last board of directors of Kimberling, in their capacity as trustees winding up the corporation's business. Damages were assessed at $400,000.00 in favor of Margaret Ann Pritchett. Mr. and Mrs. Pritchett were awarded medical expenses ($25,783.34) and the value of their boat ($2,900.-00) along with a pre-judgment interest. Damages for Mike Oldham's physical injuries were assessed at $10,000.-00; an award was made for $3,675.00 plus pre-judgment interest for medical expenses to his parents. With regard to Recreation Unlimited, Inc., the Court concluded that there was no joint enterprise between it and Kimberling and, therefore, held that there was no joint liability with Kimberling. Referring specifically to Civil Action No. 3122, pursuant to 46 U.S.C. §183(a), Recreation's liability was limited to the value of its boat ($3,500.00) and that

amount was divided proportionately among the Pritchetts and Oldhams. No liability was imposed on Charles J. Dando.

Plaintiffs Pritchett, claimants Oldham and defendant Kimberling Cove, Inc. appealed. Consolidated Appeals Nos. 76-1912, 76-1913 and 76-2014 were submitted to the United States Court of Appeals for the Eighth Circuit on June 16, 1977 and the Court's Opinion was filed on December 7, 1977. In its Opinion the Eighth Circuit affirmed the District Court's finding of negligent entrustment with resulting liability on Kimberling Cove, Inc.; reversed the District Court's holding on the issue of joint enterprise, and held Recreation Unlimited, Inc. jointly liable with Kimberling Cove, Inc.; denied Recreation's petition for limitation of liability based on Recreation's vicarious liability for the acts or omissions of Kimberling; and affirmed the District Court's holding that operating the marina did not involve an unreasonable risk of harm to others and its finding of no liability on the part of Charles Dando.

Thereafter, Dando Enterprises, formerly Recreation, petitioned the United States Court of Appeals for the Eighth Circuit for a rehearing and filed its suggestion for a hearing by that Court en banc. The Court declined to hear the matter en banc or to rehear this matter but pursuant to the Petition for Rehearing issued its Order dated January 30, 1978 modifying the Court's Opinion. See infra Appendix A, pages A-26 and A-27.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve the Conflict Between the Decision of the Court Below and Decisions on the Same Federal Question of This Court, in Particular Coryell v. Phipps, Infra, and of Other Circuits of the United States Court of Appeals.

The federal question presented arises in the interpretation of the Limitation of Liability Act, 46 U.S.C. §183(a). That Section in pertinent part provides as follows:

> *Section 183. Amount of liability; loss of the life or bodily injury; privity imputed to owner; "seagoing vessel"*
>
> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of any such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in sub-section (b) of this Section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Petitioner herein contends that this Court in *Coryell v. Phipps*, 317 U.S. 406, 68 S. Ct. 291 87 L. Ed. 363 (1943), interpreted the Limitation of Liability Act to require a search of the managerial hierarchy of a corporate vessel owner and a finding of actual fault or neglect within the corporation before the owner will be denied the benefits of

the statute. The court below denied Recreation Unlimited, Inc. the benefits of the statute without such a determination.

The fundamental purpose of the Limitation of Liability Act is to encourage development of American merchant shipping by limiting the vessel owner's liability for damages, arising from maritime disasters, occasioned without his privity or knowledge, to the value of his investment. *In Re Pan Oceanic Tankers Corp.*, 332 F. Supp. 313 (D.C. N.Y. 1971). Although the purpose of the Act is to encourage commercial shipping activity, the owners of pleasure craft are entitled to avail themselves of the statute and limit their liability in accordance with the statute. *Gibboney* v. *Wright*, 517 F.2d 1054 (5th Cir. 1975).

It was the intention of Congress to relieve shipowners from the consequences of all *imputable culpability* by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. *Continental Insurance Co.* v. *Sabine Towing Co., Inc.*, 117 F.2d 694 (5th Cir. 1941). Thus, the phrase "privity and knowledge", as used in the Limitation of Liability Act, is a term of art meaning complicity in the fault that caused the accident. *Empire Sea Foods, Inc.* v. *Anderson*, 398 F.2d 204 (5th Cir. 1968), cert. denied, 393 U.S. 983, 89 S. Ct. 449, 21 L. Ed. 2d 444. When an agent or servant of an owner negligently injures another in operation of the vessel, the ordinary rules of respondeat superior do not apply; the owner of the vessel is entitled to have his liability limited to the value of the vessel if the loss was occasioned without his privity or knowledge. *Holloway Concrete Products Co.* v. *Beltz-Beatty, Inc.*, 293 F.2d 474 (5th Cir. 1961).

Where, as in the case at bar, the owner of a vessel is a corporation, this Court has held that the "privity or

knowledge" of an executive officer, manager or superintendent, whose scope of authority includes supervision over the phase of the business out of which the injury or loss occurred, is the "privity or knowledge" of the corporate owner. *Coryell* v. *Phipps*, supra. Therefore, when the corporate owner of a vessel seeks to limit its liability, the limitation can be defeated only if an executive officer, manager or superintendent, whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred, has personal cognizance of, or participates in, the fault or negligence which causes the loss or injury. In short, there must be some culpability within the managing personnel of the corporation, chargeable to the corporation, to preclude the corporate owner's limitation of liability. Thus, there is the search, described by the late Justice Douglas in *Coryell* v. *Phipps*, supra, to see where in the managerial hierarchy the fault lies.

In the opinion below (by the Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, sitting by designation), the Court did not engage in the search for fault in the managerial hierarchy of Recreation Unlimited, Inc. that would supply the "privity or knowledge" required to deny the petition for limitation of liability under 46 U.S.C. §183(a). Rather, it based its denial solely upon the existence of a joint enterprise between Kimberling Cove, Inc. and Recreation Unlimited, Inc. and the imputed or vicarious liability flowing therefrom. In that Court's opinion, with reference to the issue of joint enterprise and its effect on Recreation's petition for limitation of liability, the Court held as follows:

> "Pritchetts and Oldhams predicate liability of Recreation on their contention that it was engaged in the joint enterprise with Kimberling, particularly in the leasing of motorboats, including the Classic. Such

a relationship would, if established, supply the privity or knowledge required to deny limitation of Recreation's liability under 46 U.S.C. §183(a), quoted earlier." (Appendix A at page A-16).

After a review of the evidence concerning the joint enterprise issue, the Court concluded as follows:

"As explained by the Restatement, the term 'joint enterprise' includes a partnership, but it is broader and extends to a cooperative undertaking to carry out a small number of activities or objectives, or even a single one, entered into by members of the group under such circumstances that all have a voice in directing the conduct of the enterprise. Each is considered the agent or servant of the others, so that the act of any member within the scope of the enterprise is charged vicariously against the rest. Thus, when the negligence of a member of a joint enterprise (acting within the scope of the enterprise) causes harm to a third person, such negligence is imputed to all other members, who become mutually liable. . . ."

"In view of the foregoing, we hold that the District Court erred in failing to conclude that the relationship between Recreation and Kimberling involving the motorboats constituted a joint enterprise."

"Also we are satisfied that the negligent entrustment *by Kimberling* clearly falls within the scope of the joint enterprise involving the rental motorboats, so that Recreation is jointly liable with Kimberling for the resulting harm to appellants *and cannot assert a limitation of liability under 46 U.S.C. §183.* Obviously the joint enterprise entailed the use of the dockhouse keys, and it was from such use by Scott Clifton that entrustment of the Classic motorboat arose." (Citations and footnotes omitted.) (Emphasis supplied.) Appendix A, pages A-18-19, A-20 and A-20).

It is clear from the portions of the Opinion set forth above that the Court assumed that if a joint enterprise existed between Recreation and Kimberling, then, as a matter of law, based on vicarious or imputed fault, Recreation was not entitled to limit its liability in accordance with 46 U.S.C. §183(a). Petitioner herein respectfully submits that the finding by the court below of a joint venture between Kimberling and Recreation is not dispositive of the issue concerning Recreation's petition to limit liability.

The court below correctly states that when the negligence of a member of a joint enterprise (acting within the scope of the enterprise) causes harm to a third person, such negligence is imputed to all other members, who become mutually liable (Appendix A, page A-19). The point upon which this petition turns is that the liability of Recreation for the negligent entrustment of the Classic boat to Scott Clifton by Kimberling Cove, Inc. is imputed to it by reason of the joint enterprise and does not arise out of any active negligence on its part. The liability of Recreation for the negligent entrustment by Kimberling is solely the vicarious liability arising by operation of law as a member of the alleged joint enterprise.

Contrary to decisions of other circuits of the United States Court of Appeals, the court below erroneously held the imputed liability of Recreation could not be limited in accordance with 46 U.S.C. §183(a). Illustrative of the conflict is *Continental Insurance Co., Inc.* v. *Sabine Towing Co., Inc.*, supra, where the Court held:

It was the intention of Congress to relieve shipowners from the consequences of all *imputable* culpability by reason of the acts or their agents or servants, or of

third persons, but not to curtail their responsibility for their own willful or negligent acts. (117 F.2d at 700). (Emphasis supplied.)

In an attempt to implement this Congressional intent, the courts have construed the words "privity or knowledge" as found in the statute as follows:

> The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part or in which he in some way participates. *Rautbord* v. *Ehnamm*, 190 F.2d 533, 537 (7th Cir. 1951) quoting *The 84-H*, 296 F. 427 (2nd Cir. 1923), cert. denied, 264 U.S. 596, 44 S. Ct. 454, 68 L. Ed. 867.

In the case of *Rautbord* v. *Ehnamm*, supra, the 7th Circuit adopted the rationale of the 2nd Circuit in *The 84-H*, supra, quoting that case as follows:

> The whole doctrine of limitation of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist, the second duty arises, which is to ascertain whether the loss or damage was occasioned without the "privity or knowledge" of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends. If, on the other hand, liability is found and loss or damage is shown, and was not occasioned or incurred with "privity or knowledge" of the shipowner, the limitation of liability should be decreed. 190 F.2d at 537.

See also *The Chickie*, 54 F. Supp. 19, 21 (W.D. Pa. 1942), aff'd in part and rev'd in part, 141 F.2d 80 (3rd Cir. 1944), in which the District Court held that the negligence of one partner would not prevent the limitation of liability of another partner who was without knowledge and privity of the negligence of his partner. The later holding of the Third Circuit did not reach this point as it disposed of the personal liability of the partners, holding the action was wholly "in rem".

Petitioner submits that while imputed knowledge may be sufficient to preclude *exoneration* from liability, it is not sufficient to preclude *limitation* of liability under 46 U.S.C. §183(a) without the additional finding that the owner, or, as here, someone in the managerial hierarchy of the corporate owner, participated in the fault or act of negligence causing or contributing to the injury suffered.

In the case of *Roe* v. *Brooks*, 329 F.2d 35 (4th Cir. 1964), a case bearing a striking resemblance on the facts to the one at bar, the Fourth Circuit reversed the trial court's finding that the owners of a motorboat and the operators of a marina were not engaged in a joint venture. However, that court did not hold that the existence of a joint venture, per se, denied the owners of the motorboat the right to limit their liability under 46 U.S.C. §183(a) as the Eighth Circuit has done in the instant case. Rather, having found a joint venture between the owners of a motorboat and the operators of a marina, the court went on to find that the owners knew that the operators of the boat (the marina operators) did not have licenses required for the operation of the motorboat. Thus, the court concluded, by directly entrusting the boat to an unlicensed crew, the boat owners had actual knowledge of the unseaworthiness of the motorboat and were not entitled to limit their liability.

Petitioner respectfully suggests to the Court that the decision by the United States Court of Appeals for the Eighth Circuit denying Recreation Unlimited, Inc's petition for limitation of liability, without a determination of the privity or knowledge of Recreation Unlimited, Inc., but based solely upon the imputed negligence of a joint venturer is in conflict with the provisions of 46 U.S.C. §183(a) and the body of case law interpreting that statute. Petitioner respectfully submits that insofar as the opinion of the United States Court of Appeals for the Eighth Circuit would be authority for the denial of limitation of liability to shipowners based upon vicarious or imputed liability of the shipowners, without a finding of actual privity or knowledge of the shipowner, such a decision involves a question of exceptional importance, marking a departure from the judicially determined intent of Congress, such as to merit a review by this Court.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-1912
No. 76-1913
No. 76-2014

Joseph H. Pritchett and Vivian M. Pritchett, Plaintiffs-Appellees,

and

Margaret Ann Pritchett, Plaintiff-Appellee,

v.

Kimberling Cove, Inc., Defendant-Appellant,

and

Dando Enterprises, Ltd. and Charles J. Dando, Defendants-Appellees,

and

In the Matter of the Complaint of Recreation Unlimited, Inc. (now Dando Enterprises, Ltd.), owner of a 1971 Classic 170 Motorboat, No. 17071681, Missouri Registry No. MO 4164 GG, for Exoneration From or Limitation of Liability, Appellee,

Joseph H. Pritchett, Vivian M. Pritchett, Margaret Ann Pritchett, Charles J. Oldham, Roma M. Oldham, and Mike Oldham, Appellants.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: June 16, 1977
Filed: December 7, 1977

Before MATTHES, Senior Circuit Judge, BRIGHT, Circuit Judge, and MILLER, Judge.*

MILLER, Judge.

This group of consolidated appeals is from the judgment of the district court (opinion unpublished).[1] The cases arose out of a tragic collision between two motorboats on Lake Tablerock in Missouri shortly after dark on August 7, 1971.

THE CASES

Civil Action No. 2792

(Involving Appeal Nos. 76-1913 and 76-2014)[2]

This was commenced by Mr. and Mrs. Joseph Pritchett, the parents of Margaret Ann Pritchett, the seriously injured minor operator of a boat owned by her parents, for medical expenses incurred for Margaret Ann Pritchett, loss of services, and damages to their boat. The sole defendant was the minor driver of the other boat, Scott Clifton.

By subsequent amendments, Recreation Unlimited, Inc. (Recreation), whose name was subsequently changed

*The Honorable Jack R. Miller, United States Court of Customs and Patent Appeals, sitting by designation.

1. The Honorable William R. Collinson, District Judge for the Western District of Missouri, entered final judgment on September 16, 1976.

2. Mr. and Mrs. Joseph Pritchett appealed the holding of no liability on the part of Recreation and Dando in Appeal No. 76-1913; Kimberling appealed the adverse judgment of liability in 76-2014.

to Dando Enterprises, Ltd., Kimberling Cove, Inc. (Kimberling), and Charles J. Dando (Dando), president of both corporations, were added as defendants.[3] Kimberling was added on the theory that it negligently entrusted to Scott Clifton the motorboat he was driving, which was docked at a marina owned by Kimberling. Recreation was added on the theory that the marina, including the motorboat (which it owned and which was under a rental-sharing arrangement with Kimberling) was operated as a joint enterprise by the two corporations. Dando was added on the theory that he was carrying on an activity through Kimberling and Recreation, as his agents, which could be lawfully carried on only under a franchise granted by public authority and which involved an unreasonable risk of harm to others; thus, he was subject to liability for physical harm caused by the negligence of the said corporations.

Before trial, Scott Clifton was dismissed by plaintiffs as a defendant.

Civil Action No. 3122

(Appeal No. 76-1912)

This was filed by Recreation to limit its liability. Recreation acknowledged ownership of the motorboat driven by Clifton, but claimed that it was being driven without its knowledge or consent; also, that since the boat was being operated on navigable waters of the United States at the time of the accident, 46 U.S.C. §§ 183-

3. The jurisdiction of the district court was based in the alternative: (1) in admiralty, because the collision occurred on navigable waters in and controlled by the United States; or (2) diversity, in that plaintiffs were at all times citizens of Kansas, the collision occurred in Missouri, the corporate defendants were incorporated and had their principal place of business in Missouri, and the individual defendants were citizens of Missouri.

189 applied.[4] It tendered $3,500.00 (the alleged value of the Recreation boat) with the court.

Mike Oldham, a minor who was a passenger in the Pritchett boat, and his parents filed an answer and claim for damages resulting from personal injuries, alleging negligent entrustment by Recreation to Clifton. His parents also filed a claim for their derivative damages.

Margaret Ann Pritchett filed an answer-counterclaim, alleging a number of grounds of active negligence on Recreation's part. Her parents filed a similar answer-counterclaim.

Civil Action No. 74 CV 341-S

(Involving Appeal Nos. 76-1913)
and 76-2014)[5]

This was filed by Margaret Ann Pritchett against Scott Clifton, Kimberling, Recreation, and Dando. The alleged bases of liability were the same as those in Civil Action No. 2792, *supra,* brought by Mr. and Mrs. Pritchett.

4. 46 U.S.C. § 183(a) provides:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

This statute applies even though only a small motorboat is involved. *See Gibboney* v. *Wright,* 517 F.2d 1054, 1057 (5th Cir. 1975).

5. Margaret Ann Pritchett appealed the holding of no liability on the part of Recreation and Dando in Appeal No. 76-1913; Kimberling appealed the adverse judgment of liability in 76-2014.

DISTRICT COURT PROCEEDINGS

The foregoing actions were consolidated, and a bifurcated trial, without a jury, was held on the issue of liability and damages. The court found that Kimberling negligently entrusted the boat to Scott Clifton, and judgments were entered against the last directors of Kimberling, in their capacity as trustees winding up the corporation's business. Damages were assessed at $400,000.00 in favor of Margaret Ann Pritchett. Mr. and Mrs. Pritchett were awarded medical expenses ($25,783.34) and the value of their boat ($2,900.00) along with prejudgment interest. Damages for Mike Oldham's physical injuries were assessed at $10,000.00, and an award was made for $3,675.00, plus prejudgment interest, for medical expenses.

Regarding Recreation, the court concluded that there was no joint enterprise between it and Kimberling and, therefore, held that there was no joint liability with Kimberling. Under 46 U.S.C. § 183(a), Recreation's liability was limited to the value of its boat, and the award was divided among the Pritchetts and the Oldhams.

The court also concluded that operating the marina did not involve an unreasonable risk of harm to others under a franchise granted by public authority; therefore, no liability was imposed on Dando.

FACTS

Kimberling Cove Marina, owned and operated by Kimberling, is on the shoreline of a large cove on Lake Tablerock in Stone County, Missouri. Both boats involved in the accident were docked there. Scott Clifton was operating a yellow Classic 17 foot motorboat, and Margaret Ann Pritchett was operating a 16 foot motorboat. Both boats were powered by large inboard-outboard engines, 140 and 155 horsepower respectively, and were capable of speeds

of about 45 miles per hour. Scott Clifton, who had turned fifteen just two days before the accident, was accompanied by a friend and two girls. There were also two couples in the Pritchett boat.

The boat driven by Clifton had been out on the lake and was returning to the marina. The Pritchett boat had left the marina for the main body of the lake. The boats approached each other on a collision course. Upon impact, the bow of the Clifton boat cut through the Pritchett boat. The trial court found:

> The evidence as to navigation lights was disputed. Similarly, the evidence as to the speed of the two boats was contested.
>
> The evidence established that the pilot of a boat approaching a lighted marina at night has much more difficulty seeing the navigation lights of a boat between him and the marina, than observing similar lights against an unlighted background, and reduced speed is necessary.

The court further found that there was no negligence or fault in the operation of the Pritchett boat.

Margaret Ann Pritchett received serious and disabling injuries, including a cerebral mass lesion on the left, a shift of the brain midline to the right, and a fracture of the skull. She also received several severe lacerations to muscles and nerve trunks. She was unconscious and in critical condition for many days and was not able to support her own life systems for over two months. Her left eye had to be removed; the right side of her face remains completely paralyzed. She has learned to walk without a cane, albeit with a wide base gait. She has permanent brain damage, which affects her gait, her vision in the right eye, her ability to speak, and causes headaches,

insomnia, and memory difficulties, which make it difficult for her to learn. Mike Oldham received an injury to his nose, mouth, forehead, and left eyelid requiring four operations.

The marina activities included storage of private boats, boat repair facilities, a fuel dock, and rental of pleasure boats. Several dockhands were employed at the marina during the summer of 1971, including Scott Clifton, who was the youngest. His duties included opening and closing the marina, fueling and renting boats, selling merchandise, providing customers with services, instructing them in the operation of rental boats, and protecting the boats in event of a storm or catastrophe. He was regularly responsible for locking up the dockhouse at night. This was located on the fuel dock and contained keys to all boats docked at the marina, including the rental boats. To perform his duties, Scott Clifton was given a set of keys to the marina facilities, including the dockhouse, and thus had access to all of the boats.

As a fringe benefit, dockhands were allowed to use the rental boats without paying rental charges; but the policy of Kimberling was to require permission, usually from the marina manager, before such use. On the night of the accident, Scott Clifton, without permission, took the Classic motorboat from its slip next to the fuel dock by using his key to the dockhouse to obtain the key to the Classic that was kept there.

During the period in which the accident occurred, Recreation was not only selling boats but furnishing boats to the marina for rental by Kimberling. The rental proceeds were divided forty percent to Recreation and sixty percent to Kimberling. There were four boats in the 1971 rental arrangement, including the Classic involved in the accident. Although these were being rented by

Kimberling to the public, they, nevertheless, remained on the inventory of Recreation and were available for demonstration and sale by Recreation.

OPINION

There are three major issues: (1) whether the district court correctly found that Kimberling negligently entrusted the Classic motorboat to Scott Clifton; (2) whether the district court erred in holding that Recreation was not conducting a joint enterprise with Kimberling which would have made Recreation jointly liable with Kimberling for negligent entrustment; and (3) whether Dando is liable for the activities of Kimberling and Recreation under the legal theory earlier discussed under Civil Action No. 2792.

(1) *Negligent Entrustment Issue*

The liability of all defendants below is dependent upon whether Kimberling negligently entrusted the Classic motoroboat to Scott Clifton.[6] Pritchetts and Oldhams base

6. The district court correctly held that admiralty law was applicable since the tort occurred on navigable waters in and controlled by the United States. Nevertheless, the court, after considering the applicable law of Missouri and of other jurisdictions, applied the doctrine of negligent entrustment. We are satisfied that the district court was correct. In *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973, 980 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974), this court said:

> A federal court sitting in admiralty does not sit as a diversity court; therefore, this is not a case "where state substantive law *must* be ascertained and applied." Rather, admiralty suits are governed by federal substantive and procedural law. However, a federal court sitting in admiralty need not "invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action . . ." Thus, admiralty courts may apply state law by express or implied reference or when the federal law of admiralty is incomplete. This Supreme Court has sustained the application of state laws which broaden the scope of liability beyond the general maritime standard. [Citations omitted.]

their argument on this point upon Restatement (Second) of Torts § 390 (1965), which provides:

> § 390. Chattel for Use by Person Known to be Incompetent
>
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

This section of the Restatement was adopted in *Stafford* v. *Far-Go Van Lines, Inc.*, 485 S.W.2d 481 (Mo. App. 1972), and was cited with favor by the Missouri Supreme Court in *Bell* v. *Green*, 423 S.W.2d 724, 732 (Mo. 1968) (en banc). *Accord, Collins* v. *Arkansas Cement Co.*, 453 F.2d 512, 514 (8th Cir. 1972) (Arkansas law).

The district court found "as a fact, under all the facts and evidence in this case, that the defendant Kimberling Cove, Inc. negligently entrusted this boat to Scott Clifton." It concluded, as a matter of law, that Kimberling was subject to liability for the physical harm suffered by the plaintiffs.[7] Considering the entire record before us, we hold that the district court's finding is not clearly erroneous. Indeed, we would add to the district court's reasons that turning over what, in our view, appears to have been an excessive amount of responsibility (*i.e.*, for opening and closing what Dando described as "the largest marina

7. It should be noted that Missouri courts consider the incompetency (including inexperience and youth) to operate an instrumentality, usually a factual question, absent a statute. *Ritchie* v. *Burton*, 292 S.W.2d 599, 606 (Mo. App. 1956), and cases cited in note 4 therein.

on a fresh water lake in the Western United States," maintaining 168 rental storage slips, 3 gas slips, 13 ski boats, and 50 fishing boats for rent to the public in addition to the boats carried on Recreation's inventory) to a boy scarcely fifteen years of age was prima facie negligent entrustment.

Four elements of proof are necessary to establish negligent entrustment under Missouri law: (1) entrustment of a chattel (directly or through a third party) to another; (2) likelihood that the person to whom the chattel is entrusted will, due to his youth, inexperience, or otherwise, use the chattel in a manner involving an unreasonable risk of harm to himself and others; (3) knowledge of the entrustor (actual or imputed) of such likelihood; and (4) proximate cause of the harm to the plaintiff by the negligence of the entrustor. *Evans* v. *Allen Auto Rental*, ... S.W.2d ....., No. 59887 (Mo. September 12, 1977) (en banc).

Kimberling, through the marina manager and with the knowledge of Frank Clifton (Scott's father), who was the vice president of Kimberling and exercised overall supervision of the marina, entrusted Scott Clifton with a key to the dockhouse, where keys to approximately 175 boats at the marina were kept. On the night of the collision, Scott Clifton obtained a key to the Classic motorboat from the dockhouse by using the key entrusted to him. Thus, there was an effective entrustment to Scott Clifton of the Classic motorboat.[8]

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8. It was Recreation's intent that Scott Clifton use the keys *to its rental boats* kept in the dockhouse to move the boats in case of a storm or catastrophe and to demonstrate the operation of the rental boats to customers. Also, it was expected that he would use the key to the dockhouse to obtain keys to the rental boats he used without charge for his own personal enjoyment after working hours.

With regard to whether, under the circumstances, there was a likelihood, due to his youth and inexperience, that Scott Clifton's use of the powerful and fast Classic motorboat would involve an unreasonable risk of harm,[9] we note that he had been permitted to operate the rental motorboats only *during daylight hours* and had not operated a motorboat prior to this particular summer. Indeed, it appears that he had operated these boats on only about ten previous occasions. Defendants point out that he instructed customers in the operation of the rental boats, but the evidence indicates that this instruction was only of the most rudimentary nature, such as how to start and operate the boat. Thus, the district court's finding that "his experience in operating boats of this nature was very limited" is well supported. It should also be noted that Scott Clifton became 15 years of age only three days before the accident. The district court emphasized that Scott Clifton's very poor school record[10] indicated either "an inferior learning ability" or "an attitude of inattention and nonapplication of his mental [faculties]," and declared:

> But, in addition to this, his youth and inexperience in the operation of powerful boats of this kind, combined with the natural inclinations of boys of this age to "show off" and to travel at maximum speeds whenever possible, would in themselves supply the likelihood of unreasonable risk of physical harm from his operation of this boat, especially at night.

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9. A nondangerous instrumentality can become dangerous when placed in the hands of an incompetent or inexperienced person. *See Dinger* v. *Burham*, 360 Mo. 465, 228 S.W.2d 696, 699 (1950); *Thomasson* v. *Winsett*, 310 S.W.2d 33, 36 (Mo. App. 1958); *Ritchie* v. *Burton*, *supra*.

10. His school grades showed, that, of the last 55 grades, he had received 23 D's and 22 F's.

For these reasons we are persuaded that, in the hands of Scott Clifton after dark, the powerful and fast Classic motorboat was a dangerous instrument likely to cause an unreasonable risk of harm not only to him but to others as well. *Evans* v. *Allen Auto Rental, supra.*

On the question of whether Kimberling knew, or had reason to know, that Scott Clifton would likely operate a rental motorboat in a manner involving an unreasonable risk of harm,[11] the district court found that Kimberling had reason to have such knowledge, namely: the knowledge possessed by the marina manager and by its vice president (Scott Clifton's father) concerning Scott's very young age, poor school record, little training in safe operation of the motorboats and no training whatsoever in their operation at night, and "very limited" experience. As stated by the district court, there is common knowledge of the "natural inclinations of teenage boys to impress their teenage friends and to run fast, powerful boats . . . ."

11. We agree that Kimberling can only be liable for negligent entrustment if Scott Clifton was negligently operating the motorboat at the time of the accident. However, we do not agree with the contention that the district court made no finding on Scott Clifton's negligence. Although there was no *specific* finding of his negligence, the opinion clearly shows that his negligence was basic to the district court's decision. As this court said in *Finney* v. *Arkansas Bd. of Correction,* 505 F.2d 194, 212 n.16 (8th Cir. 1974):

> Findings of fact by the district court . . . are not jurisdictional in an appellate court. An appellate court may render a decision in their absence if it feels that it is in a position to do so. It is in a position to do so when . . . the record itself sufficiently informs the court of the basis for the trial court's decision on the material issue . . . . [Citations omitted.]

See generally 9 C. Wright & A. Miller, *Federal Practice and Procedure* Civil § 2577 at 699-700 (1971).

The evidence of record supports a finding of negligence on the part of Scott Clifton. Also, the district court found that "reduced speed is necessary" when approaching a lighted dock because of the inability to see outgoing boats. Although the speed of the Classic motorboat driven by Scott Clifton was contested, the district court noted that the severity of its impact across the starboard side of the Pritchett boat indicates that it was traveling at a high rate of speed. Indeed there is evidence that the Classic motorboat was traveling at nearly full throttle. Moreover, the court found that there was no negligence in the operation of the Pritchett boat. The court's emphasis on Scott Clifton's inexperience, youth, and poor school record would be irrelevant if it had concluded that he was not negligent.

Restatement (Second) of Torts § 390, comment b., indicates that liability will be imposed if the supplier (Kimberling) had reason to know that the other party (Scott Clifton) would use the chattel (motorboat) dangerously because he was incompetent or because he lacked necessary training and experience:

> [L]iability is based upon the rule . . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so. Thus, one *who supplies a chattel* for the use of another who knows its exact character and condition *is not entitled to assume that the other will use it safely if the supplier knows* or has reason to know that such other is likely to use it dangerously, as where [1] *the other* belongs to a class which is notoriously incompetent to use the chattel safely, *or* [2] lacks the training and experience necessary for such use, *or* [3] the supplier knows that the other has on other occasions so acted that the supplier should realize that the chattel is likely to be dangerously used, *or* [4] that the other, though otherwise capable of using the chattel safely, has a propensity or fixed purpose to misuse it. [Emphasis added.]

See Stafford v. *Far-Go Van Lines, Inc., supra*; *Boland* v. *Love,* 222 F.2d 27 (D.C. Cir. 1955). Kimberling argues that its knowledge of Scott Clifton's inexperience and youth is insufficient to charge it with knowledge of the likelihood that he would use the motorboat dangerously.

It emphasizes his trustworthiness displayed on the job, the lack of a showing of his propensity to misuse motorboats, and the lack of evidence of his reckless operation of boats on prior occasions. However, these points, though relevant, do not cover all four bases for liability listed in the Restatement quoted above.

It is also argued that for Kimberling to be liable, there must be a finding that it, through its agents, consented to Scott Clifton's use of the motorboat on the night of the accident; that his consent must have been expressed or, at least, shown by a pattern of conduct from which consent could be inferred.[12]

Although it was the policy of Kimberling that its employees obtain permission before using the rental motorboats, and although there is no evidence showing that Scott Clifton had ever been given permission to operate any of those boats at night, he had complete access to the keys to them at all times; also, he admitted at trial that he did not recall any prohibition against using them at night.[13] Obviously, Kimberling's policy was not an adequate safeguard against use of the dockhouse key to

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12. Kimberling cites comment a. to section 308 of the Restatement:

> The words "under the control of the actor" are used to indicate that the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

We note that section 308 is referred to in comment b. to section 390, quoted in part earlier in this opinion.

13. The evidence discloses that Scott Clifton and the same young people who accompanied him at the time of the accident had used the Classic motorboat without permission on the night before the accident. Although the district court found that he had never been given permission to use the boat at night, the only evidence on the point (Scott Clifton's own testimony) indicates that he was never denied permission.

gain access to the rental motorboats. Moreover, permission has a negative, as well as an affirmative, connotation. "The absence of a prohibition against an expected or foreseeable or natural use may be strongly indicative that such use is permissible." *Kemp* v. *MFA Mutual Insurance Co.*, 468 S.W.2d 700, 705 (Mo. App. 1971), and cases cited therein. The record here discloses a pattern of conduct wherein permission was always granted when a boat was not needed for rental or when the employee was not scheduled to work.[14]

In *Pierce* v. *Standow*, 163 Cal. App. 2d 286, 329 P.2d 44 (1958), cited with approval in *Stafford* v. *Far-Go Van Lines, Inc.*, *supra* at 488, a mother had specifically forbidden her 17 year old son to drive, but, nevertheless, gave him the key while he waited in the car after school. The court, holding the mother liable for negligent entrustment, said (329 P.2d at 45):

> The admitted fact that appellant daily entrusted to her son the keys . . . thus putting it in his power to drive the car at will is, in our judgment, sufficient to support the inference . . . that she impliedly consented to his doing so.

Accord, Elkinton v. *California State Auto Ass'n*, 173 Cal. App. 2d 338, 343 P.2d 396 (1959). The facts supporting a finding of implied consent are even stronger in the instant cases.

Accordingly, we hold that the district court correctly concluded that Kimberling was liable for the harm suffered by the plaintiffs.

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14. On only one occasion was permission denied Scott Clifton—the afternoon of the accident. The reason given was that he was scheduled to work, and the boat was required to be available for rental. He subsequently took the boat after completing his scheduled work and after rental hours.

(2) *Joint Enterprise Issue*

Pritchetts and Oldhams predicate liability of Recreation on their contention that it was engaged in a joint enterprise with Kimberling, particularly in the leasing of motorboats, including the Classic. Such a relationship would, if established, supply the "privity or knowledge" required to deny limitation of Recreation's liability under 46 U.S.C. § 183(a), quoted earlier. The district court concluded, as a matter of law, that the relationship between Recreation and Kimberling did not constitute a joint enterprise, so that Recreation was not jointly liable with Kimberling.[15]

Kimberling was originally incorporated to operate the marina under an assignment to it of a sublease that had been approved by the Corps of Engineers, which controlled the shoreline of the lake. Its stock was offered to the public, and at the time of the accident there were 120 stockholders. These included appellee Dando and his wife who owned seventy-two percent of the stock, having purchased it in July 1969, after which Dando became president of Kimberling. Some six months later, Recreation, which had been incorporated in April 1969, with its stock wholly owned by Dando, established an office on the marina fuel dock. By April 1971 Recreation had constructed a building and showroom on private property near the marina. Kimberling's rental under the sublease included a percentage of the sales of boats and marina equipment. To reduce this

15. Recreation contends that the district court's findings relating to the issue of joint enterprise are factual and, thus, cannot be set aside unless clearly erroneous. However, the conclusion on whether there was a joint enterprise is clearly a conclusion of law.

rental, Dando had the sales of boats and marine equipment transferred from Kimberling to Recreation.[16]

Although the records of Kimberling and Recreation were kept separately and accounts were maintained between them, there is persuasive evidence of a joint enterprise relationship between the two corporations. Frank Clifton, father of Scott Clifton, was vice president of both, but solely on the payroll of Recreation; he occasionally oversaw the work of John Hillman, Kimberling's marina manager, and, at the time of the accident, performed general office duties for Kimberling that included slip rentals and dealings with suppliers, creditors, and debtors. A Coralee Patrick was secretary and treasurer for each corporation, and records for both corporations were maintained at the same desk in the Recreation office. Dando performed services as president of each corporation but was paid by neither.[17] Hillman was paid by Kimberling, but he demonstrated Recreation's boats to prospective purchasers and collected accounts receivable owed both Recreation and Kimberling on the same invoice.

There was a similar informal intermingling of the services of the dockhands, including Scott Clifton, by the two corporations. A George Katz worked for and was paid by Recreation, but he cut the grass and picked up trash on Kimberling's land. Immediately prior to going on Recreation's payroll, he was paid by Kimberling for these services. The only difference he noticed was that one check came from one corporation and the next from another. Scott Clifton's functions were similarly divided between the two corporations. He had been paid by Recreation until

16. The record discloses that, at a Kimberling stockholders' meeting, one of the stockholders attempted (unsuccessfully) to stop the transfer.

17. Testimony indicates that this was to avoid income tax.

two or three days before the accident, when he was transferred from Recreation's payroll to the payroll of Kimberling. However, he had been working on the fuel dock for Kimberling since June.[18] Thus, while employed by Recreation, he was performing the functions and receiving the fringe benefits (*e.g.*, free use of the rental boats) of an employee of Kimberling. Even on the day of the accident, while on Kimberling's payroll, he was waxing one of Recreation's boats in the Recreation building.

In addition to the informal intermingling of services of employees, the two corporations were jointly promoted. They had the same advertising logo on their stationery, the same telephone numbers, and the same post office box at Kimberling City; they had a joint sign at the edge of the property, and each had a sign on the Recreation building. As a result, they created a public impression that they were closely related. It was for this reason that the Corps of Engineers audited the books of Recreation which, except for this relationship with Kimberling, could not have been considered a party to the sublease that had been approved by the district engineer.

As explained by the Restatement,[19] the term "joint enterprise" includes a partnership, but it is broader and extends to a cooperative undertaking to carry out a small number of activities or objectives, or even a single one, entered into by members of the group under such circumstances that all have a voice in directing the conduct of the enterprise. Each is considered the agent or servant

18. Confusion over his relationship to the two corporations is demonstrated by his testimony during which he said he only worked for Recreation for a week or two; yet the bookkeeper testified that he was transferred to Kimberling's payroll only a few days before the accident on August 7.

19. Restatement (Second) of Torts § 491 (1965) and comment b. thereto.

of the others, so that the act of any member within the scope of the enterprise is charged vicariously against the rest. Thus, when the negligence of a member of a joint enterprise (acting within the scope of the enterprise) causes harm to a third person, such negligence is imputed to all other members, who become mutually liable. *Rowe* v. *Brooks*, 329 F.2d 35 (4th Cir. 1964); *Hamilton* v. *Slover*, 440 S.W.2d 947, 952 (Mo. 1969), citing Restatement (Second) of Torts § 491 favorably.

The district court described the arrangement involving the rental motorboats, under which Kimberling received sixty percent of the rental income and Recreation forty percent, as a "plain, straight-forward business transaction."[20] Although we agree with this characterization, we disagree with the court's conclusion that the two corporations were not engaged in a joint enterprise—at least insofar as the rental motorboat operation was concerned. All parties recognize that there was an agreement, albeit oral and imprecise. Whatever the terms, they were flexible. For example, the number and type of motorboats were not constant during the boating season. Significantly, Recreation did not treat the rental motorboats as under Kimberling's sole control. Instead, they were maintained on Recreation's sales inventory, and Recreation at all times had full power to substitute, demonstrate, and sell them. It appears that they were used for pleasure by Recrea-

20. The only other findings in the district court's opinion that relate to the joint enterprise issue were:

> There is no evidence that there was any disregard of the separate corporate entities of these corporations by their common officers and directors. The records of each corporation were kept separately and accounts were maintained between them. There was obviously no ulterior motive such as fraud or deception in the operation of the two separate, independent, and noncompetitive businesses of these two companies.

tion's employees (including Scott Clifton when he was on Recreation's payroll).

In view of the foregoing, we hold that the district court erred in failing to conclude that the relationship between Recreation and Kimberling involving the rental motorboats constituted a joint enterprise.[21]

Also, we are satisfield that the negligent entrustment by Kimberling clearly falls within the scope of the joint enterprise involving the rental motorboats, so that Recreation is jointly liable with Kimberling for the resulting harm to appellants and cannot assert limitation of liability under 46 U.S.C. § 183. Obviously the joint enterprise entailed use of the dockhouse key to obtain access to the rental motorboat keys, and it was from such use by Scott Clifton that entrustment of the Classic motorboat arose.[22]

(3) *Issue of Dando's Liability*

Appellants argue that Dando is the holder of a franchise granted by public authority which involves an unreasonable risk of harm to others, so that he is subject to

21. Recreation argues that "mere sharing of proceeds or profits of an activity does not, in and of itself, create a joint enterprise." We agree. However, as pointed out above, there was much more to its relationship with Kimberling. It further argues that common ownership and interlocking directors alone are insufficient to establish that two corporations are one. We also agree, but note that our holding relates to the issue of joint enterprise—not to whether one corporation was the "alter ego" of the other.

22. Recreation is also chargeable with knowledge that such entrustment was negligent for, as in the case of Kimberling, it had knowledge (through its vice president, Scott Clifton's father) concerning Scott's very young age, poor school record, inadequate training, and "very limited" experience; also, there was common knowledge of the natural inclination of teenage boys to impress their teenage friends by running powerful motorboats at a high rate of speed. *See Great Atlantic & Pacific Tea Co.* v. *Brasileiro*, 159 F.2d 661, 665 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947); *In re Theisen*, 349 F.Supp. 737, 740 (E.D.N.Y. 1972); *Beal* v. *Chicago B. & Q. R.R.*, 285 S.W. 482, 487 (Mo. 1926).

liability for physical harm caused by the negligence of Kimberling and Recreation which carried out the franchised activity.[23] They cite the Restatement (Second) of Torts § 428 (1965):

> § 428. Contractor's Negligence in Doing Work Which Cannot Lawfully be Done Except Under a Franchise Granted to His Employer
>
> An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of a contractor employed to do work in carrying out the activity.

This theory of liability has long been recognized in Missouri. *Williamson* v. *Southwestern Bell Telephone Co.*, 265 S.W.2d 354, 357 (Mo. 1954); *Virgil* v. *Riss & Co.*, 241 S.W.2d 96, 99 (Mo. App. 1951).

The district court, in analyzing the applicability of Restatement § 428, expressed its belief that a lease of land with the permission and authority to operate a marina could not be classified as a "franchise." Moreover, noting that the Restatement, as well as the case law, qualifies "franchise" as one "which involves an unreasonable risk of harm to others," it held that "[t]here is no evidence from which this Court could find that the activity of operating a marina involves any unreasonable risk of harm to others so that even if the sublease could be found to be a 'franchise granted by public authority,' the principle of law stated in the Restatement would still not apply."

23. Missouri law applies to this issue since there is no applicable admiralty rule. *St. Hilaire Moye* v. *Henderson, supra.*

Thus, the controlling issue is whether operation of the marina involved an "unreasonable risk of harm."[24] Comment a. to Restatement § 428 discloses that the activities covered involve the use of instrumentalities "which are peculiarly dangerous unless carefully operated." The concept of "peculiar risk" appears in Restatement § 416 and is defined in Comment d. as follows:

> A "peculiar risk" is a risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions. (See § 413, Comment *b*.)[25]

Comment b. to Restatement § 413 further contributes to an understanding of "peculiar risk":

> This Section is concerned with special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as

24. Our disposition of this issue makes it unnecessary to resolve a hotly contested issue of whether Dando or Kimberling owned the sublease under which the marina was operated.

25. This comment contains the following illuminating example:

> Thus if a contractor is employed to transport the employer's goods by truck over the public highway, the employer is not liable for the contractor's failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for. But if the contractor is employed to transport giant logs weighing several tons over the highway, the employer will be subject to liability for the contractor's failure to take special precautions to anchor them on his trucks.

> driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions.

The Missouri courts are in substantial agreement with the Restatement, holding that the activity must involve an inherent risk of harm which arises out of the nature or character of the work done. In *Southwestern Bell Telephone Co.* v. *Rawlings Manufacturing Co.*, 359 S.W.2d 393, 398 (Mo. App. 1962), the court said:

> There is an exception to this where the work, during its progress, creates a peculiar risk of bodily harm to others unless special precautions are taken. If the risk is such that it should be recognized by the employer and personal injury results to a third party by reason of the contractor's failure to take necessary precautions, then the nondelegable duty is imposed and the employer held liable. Stubblefield v. Federal Reserve Bank of St. Louis, 356 Mo. 1018, 204 S.W.2d 718 [1947].

In *Boulch* v. *John B. Gutmann Construction Co.*, 366 S.W.2d 21, 31 (Mo. App. 1963), the court observed:

> The hauling of dirt in trucks, if done carefully and without negligence on the part of the hauler, is not work which in itself is inherently dangerous. If the contractor directs the subcontractor to perform an act which is intrinsically dangerous to others the general contractor cannot escape liability for injuries that may occur. In such cases the injury flows from the doing of the act as its natural consequence, and not from the manner in which it is done. Salmon v. Kansas City, 241 Mo. 14, 145 S.W. 16 [1912].

See Underwood v. *Crosby*, 447 S.W.2d 566, 568 (Mo. 1969) (en banc).

Pritchetts and Oldhams argue the applicability of Restatement § 428, saying that—

> the construction of the marina, the locating of the marina storage facilities in close proximity in the cove and the collection of the keys to all of the boats in a central location [were acts which] . . . substantially increased the risk of harm from unauthorized uses of the boats and required special precautions. Those acts are the acts that result in the "peculiar" risk constituting the "unreasonable risk of harm."

We cannot agree that such acts are "intrinsically dangerous." Appellants have not cited any case in which similar activities have been held to constitute an unreasonable risk of harm. Indeed, almost all of the cases have involved railroads and other common carriers, such as tractor trailers which transport goods over the public highways, where the "peculiar" risk is obvious.[26] We see no practical difference in the risk of harm involved in operating a marina and that involved in operating an automobile service station and garage, where autos are fueled, repaired, and stored. Such "risk" is no more than what

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26. Appellants cite *American Transit Lines* v. *Smith*, 246 F.2d 86 (6th Cir.), *cert. denied*, 355 U.S. 889 (1957) (applying Ohio law), for the proposition that the use of motor vehicles by common carriers on the highway is a "peculiar risk" under Restatement § 428, because it increases the "automobile traffic on the highway." This misses the basis of the court's holding—the potential destructiveness of an accident involving a large tractor trailer.

Clearly, the risk of harm *inherent* in operating a large tractor trailer on the public highways is not comparable to the risk of harm involved in the operation of a marina which services, rents, and stores pleasure boats for the public. Nor is the risk here involved comparable to that involved in *Union Elec. Co.* v. *Pacific Indemn. Co.*, 422 S.W.2d 87 (Mo. App. 1967), where the defendant maintained 2400 volt overhead, uninsulated power distribution lines. *Compare* Restatement (Second) on Torts § 416, Comment d., *supra* note 25. The district court recognized that the cases cited by appellants concerned common carriers operating under a permit.

is to be expected in the everyday life of a community. Accordingly, we agree with the district court on this issue.

Summary

In summary, we (1) affirm the district court's finding of negligent entrustment, which results in liability on the part of Kimberling, (2) reverse the district court's holding on the joint enterprise issue, which results in Recreation's joint liability with Kimberling, and (3) affirm the district court's holding that operating the marina did not involve an unreasonable risk of harm to others under a franchise granted by public authority, so that there is no liability running to Dando. We assess costs one-third to Kimberling, one-third to Recreation, and one-third to Pritchetts.

Affirmed in part and reversed in part.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

76-1912

Recreation Unlimited, Inc.,
Appellee,

vs.

Mike Oldham, et al.,
Appellants.

76-1913

Joseph H. Pritchett, et al.,
Appellants,

vs.

Kimberling Cove, Inc., etc., et al.,
Appellees.

Appeals from the United States District Court for the Western District of Missouri

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The Court having considered petition for rehearing en banc filed by counsel for appellees Recreation Unlimited, Inc. and Dando Enterprises, Ltd., etc. and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

January 18, 1978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1912
No. 76-1913
No. 76-2014

Joseph H. Pritchett and Vivian M. Pritchett,
Plaintiffs-Appellees,

and

Margaret Ann Pritchett, Plaintiff-Appellee,

v.

Kimberling Cove, Inc., Defendant-Appellant,

and

Dando Enterprises, Ltd. and Charles J. Dando,
Defendants-Appellees,

and

In the Matter of the Complaint of Recreation Unlimited, Inc. (now Dando Enterprises, Ltd.), owner of a 1971 Classic 170 Motorboat, No. 17071681, Missouri Registry No. MO 4164 GG, for Exoneration From or Limitation of Liability, Appellee,

Joseph H. Pritchett, Vivian M. Pritchett, Margaret Ann Pritchett, Charles J. Oldham, Roma M. Oldham, and Mike Oldham, Appellants.

Appeals from the United States District Court for the Western District of Missouri.

ORDER

Having considered the petition for rehearing of Dando Enterprises, Ltd. (formerly Recreation Unlimited, Inc.), it is ordered that the petition be denied except as follows:

(1) The court's opinion is modified to correct two errors deemed nonprejudicial, thus:

(a) in line 2 on page 11, insert after "marina" the following: "in Dando's absence"

(b) in line 1 of footnote 8 on page 11, change "Recreation's" to "Kimberling's"

(2) It is ordered that Civil Action No. 2792 be remanded to the district court for reconsideration of the cross claims of the corporations, consistent with our opinion, and the district court is further directed to enter an appropriate order or judgment thereon.

JANUARY 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977
No. 76-1912

Recreation Unlimited, Inc., Appellee,

vs.

John H. Pritchett and Vivian M. Pritchett,

vs.

Mike Oldham, Charles J. Oldham, Roma M. Oldham,
Appellants.

No. 76-1913

Joseph H. Pritchett and Vivian M. Pritchett,
Appellants,

vs.

Kimberling Cove, Inc., a corporation and Dando Enterprises, Ltd., formerly known as Recreation Unlimited, Inc., and Charles J. Dando, Appellees.

Margaret Ann Pritchett, Appellant,

vs.

Kimberling Cove, Inc., a corporation Dando Enterprises, Ltd., and Charles J. Dando, Appellees.

Dando Enterprises, Ltd., formerly known as Recreation Unlimited, Inc., Appellee,

vs.

John H. Pritchett, Vivian M. Pritchett, and
Margaret Ann Pritchett, Appellants,

Mike Oldham, Charles J. Oldham, Roma M. Oldham.

No. 76-2014

Joseph H. Pritchett and Vivian M. Pritchett, Appellees,

Margaret Ann Pritchett, Appellee,

vs.

Kimberling Cove, Inc., Appellant,

Dando Enterprises, Ltd., formerly known as Recreation Unlimited, Inc., and Charles J. Dando.

Appeals from the United States District Court for the Western District of Missouri.

On motion of Recreation Unlimited, Inc., it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 9, 1978

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

Civil Action

No. 2792

JOSEPH H. PRITCHETT and VIVIAN M. PRITCHETT, Plaintiffs,

vs.

SCOTT CLIFTON, a minor, et al., Defendants.

No. 74CV341-S

MARGARET ANN PRITCHETT, Plaintiff,

vs.

SCOTT CLIFTON, a minor, et al., Defendants.

Civil Action

No. 3122

In the Matter of the Complaint of RECREATION UNLIMITED, INC., owner of a 1971 Classic 170 Motorboat, No. 17071681, Missouri Registry No. MO 4164 GG, for Exoneration from or Limitation of Liability.

MEMORANDUM OPINION AND JUDGMENT

(Filed August 19, 1976)

This group of consolidated cases arose out of a serious and tragic collision between two motor boats, at night, on Lake Tablerock, August 7, 1971. The first suit was filed by Mr. and Mrs. Joseph Pritchett, the parents of

Margaret Pritchett, the seriously injured minor operator of one boat, for medical expenses and loss of service. The sole defendant was the minor driver of the other boat, Scott Clifton. By subsequent amendments two corporations, Recreation Unlimited, Inc. and Kimberling Cove, Inc., and an individual, Charles J. Dandc (president of both corporate defendants) were added as defendants.

Thereafter, Recreation Unlimited, Inc. filed case No. 3122 "for Exoneration from or Limitation of Liability," alleging that it was the owner of the boat driven by Clifton; that it was being driven without Recreation's knowledge or consent; that the boat was being operated on navigable waters of the United States at the time of the accident; and praying that, under the provisions of 46 U.S.C. §§ 183 to 189, all parties having claims be enjoined from processing any suits and be required to file such claims in this action. Recreation tendered $3,500.00 (the alleged value of the boat) into court.

Mike Oldham, a minor, and his parents, filed an answer and claim for damages in this second suit, alleging negligent entrustment by plaintiff to Clifton. Oldham was a passenger in the Pritchett boat.

Margaret Ann Pritchett filed an answer-claim in this suit, alleging a number of grounds of active negligence on plaintiff's part. Her parents filed a similar answer-claim.

Margaret Ann Pritchett then filed a suit against Scott Clifton, Kimberling Cove, Inc., Dando Enterprises, Ltd. (formerly known as Recreation Unlimited, Inc.) and Charles J. Dando. In this case the plaintiff alleged that the accident occurred on navigable waters of the United States.

In the first case mentioned the two corporate defendants each filed a cross-claim against the other alleging liability in the event of a judgment against the cross-claimant.

Before trial Scott Clifton was dismissed by plaintiffs as a defendant in the two cases in which he was so named.

A very complete pretrial order was drafted by all the parties containing stipulations of fact, stipulations of factual issues, and stipulations of issues of law.

Possibly due to a misunderstanding, the Court concluded after a number of pretrial conferences, that only the plaintiffs insisted on the right to a jury trial, and that all the other parties contended that all claims arose under admiralty law, with the consequent rule of comparative negligence, rather than contributory negligence, being applicable, and no right to a jury trial. The plaintiff conceded this point on the eve of trial and the Court announced it would try the case without a jury. The defendant Dando objected, claiming that a factual issue still existed as to whether the accident occurred on navigable waters of the United States. The defendant Dando, in his capacity as president of the corporate defendants, had stated, in answer to interrogatories, that the accident occurred on navigable waters. On the eve of trial, however, the attorneys representing him in his individual capacity demanded a jury trial, contending that the waters involved were not navigable. Because all of the witnesses on liability and damages (some from a considerable distance) were present, and no witnesses had been subpoenaed on the navigability question, the Court tried liability and damages first, then set a later hearing with ample time for the parties to appear, on the navigability issue.

A number of witnesses were heard and exhibits introduced on this second issue. The Court finds that the White River, the impoundment of which created Tablerock Lake, has been used as a navigable stream for commerce at least as far toward its headwaters as the mouth of James River, since long before the Civil War and as recently as the

1930's. The early settlers of the White River and James River Valleys came up the river in keel boats. The same type of boats were used for many years to transport trade goods and crops. Tie rafts utilized the river to transport ties to the railroad at Branson, Missouri, after it was built well into this century.

Since the place of the accident which is the subject of this litigation is many miles downstream from the mouth of James River, this lake, at least at this point, undoubtedly constitutes navigable waters of the United States.

It is well established that a lake formed by impoundment of waters of a navigable river then constitutes navigable waters of the United States within the jurisdictional provision of Article III, Section 2, Clause 1, of the United States Constitution. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Loc-Wood Boat & Motors, Inc.* v. *Rockwell*, 245 F.2d 306 (8th Cir. 1957).

The rafting of logs has been held to meet the test of navigability. *The Montello*, 20 Wall. 430 (U.S. 1874); *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F.2d 743 (7th Cir. 1945); *Wisconsin* v. *Federal Power Commission*, 214 F.2d 334 (7th Cir. 1954).

Basically, the claims of Margaret Ann Pritchett, a minor, and of her parents, and the claim of Mike Oldham, a minor, and his parents, all against Recreation Unlimited, Inc. are at issue in case No. 3122, the suit brought by Recreation to limit liability to the value of the boat and cargo.

The claims of Margaret Ann Pritchett against Kimberling Cove, Inc. and Charles J. Dando are at issue in case No. 75CV341-S, and the claims of her parents against the two corporations and Dando are at issue in case No. 2792.

Since all of these claims arose out of the same accident, they were consolidated for trial.

THE ACCIDENT

Kimberling Cove Marina is on the shore line of a large cove on Tablerock Lake. Both boats involved in the accident were docked, during the boating season, at this marina. Both boats were powered by "inboard-outboard" engines, the horsepower being 155 for the Pritchett boat and 140 for the Clifton boat. Both were capable of speeds above 45 miles an hour. They were both primarily designed for pleasure riding and towing water skiers.

The accident occurred shortly after dark. The Clifton boat had been out on the lake and was returning to the marina. The Pritchett boat had left the marina and was approaching the main body of the lake.

In both boats the helmsman's seat was on the right side of the front seat, located in the front of the passenger compartment. In the Pritchett boat the two passengers in the rear seat faced the rear.

The boats approached each other on a collision course. The passenger seated beside the driver in the Pritchett boat saw the Clifton boat an instant before the collision, approaching from the starboard bow, and shouted a warning. Miss Pritchett swung the boat to the left, too late, and the bow of the Clifton boat cut through the Pritchett boat in the immediate area in which the Pritchett girl was seated, in other words, on the starboard side of the boat nearer the bow than the stern. The Pritchett boat was salvaged and the pictures show that the impact had been severe.

The evidence as to navigation lights was disputed. Similarly, the evidence as to the speed of the two boats was contested.

The evidence established that the pilot of a boat approaching a lighted marina at night has much more difficulty seeing the navigation lights of a boat between him

and the marina, than observing similar lights against an unlighted background, and reduced speed is necessary. The Court further finds that there was no negligence or fault in the operation of the Pritchett boat.

DAMAGES

The plaintiff Margaret Ann Pritchett received serious and disabling injuries in this accident, including a cerebral mass lesion on the left, a shift of the brain midline to the right and a fracture of the skull. In addition to the crushing head injuries, she received several severe lacerations to muscles and nerve trunks. She was unconscious and in critical condition in the hospital for many days and was not able to support her own life systems until October 17, 1971.

Her left eye had to be removed. She now wears a prosthetic eye and the right side of her face remains completely paralyzed. At the time of the trial, she had learned to walk without a cane, which she had been required to use for some time, but has a wide base gait, which is caused by brain damage and is permanent. The paralysis of one side of her face is not noticeably disfiguring when the face is in repose, but gross distortion is seen when speaking or smiling, since the paralyzed side of her face remains immobile.

She has permanent brain damage, which not only affects her gait but causes headaches and insomnia and memory difficulties, which make it difficult for her to learn. She only has 50% function of her right eye, due either to the brain injury or the nerve damage which causes the paralysis on that side of her face. As a result of this accident her vocal cords were damaged, and prior to the accident she was taking private voice lessons and had a very exceptional and promising singing voice. Before the

accident she was very active physically, and participated in many outdoor sports, which she will never be able to participate in again. She is now 23 years of age and these disabilities are unquestionably permanent. The Court assesses the plaintiff Margaret Ann Pritchett's damages from the injuries received in this accident at $400,000.00.

It is stipulated that Mr. and Mrs. Joseph Pritchett, the parents of Margaret Ann Pritchett, who was 18 years old at the time of this accident, expended the sum of $25,783.34 for medical expenses for their minor daughter, and further stipulated that the reasonable damages for the destruction of their boat was $2,900.00. The Court finds that prejudgment interest should be awarded on the sum of $2,900.00 from the date of the accident and that prejudgment interest should be awarded on the medical expenses computed by taking the average date between January 1, 1972 to June 1, 1976.

The plaintiff Mike Oldham received an injury to his nose, mouth and forehead and left eyelid. He had surgery on the nose and eyelid and was hospitalized for about a week after the accident. The fall after the accident he played football and was on the wrestling team of his school, wearing a special nose brace in these sports. However, his nose gradually closed up and he had had a second operation in 1972 and a third operation in 1973 for repairs on the nose to make his breathing less difficult. His plastic surgeon has recommended a fourth operation on the nose. The Court assesses the plaintiff Mike Oldham's damages from his physical injuries at $10,000.00. His parents established medical expenses to them of $3,175.00 to date and the necessity of spending an additional $500.00 for the fourth nose operation recommended by his doctor. The Court, therefore assesses the damages of the Oldham parents at $3,675.00 with prejudgment interest based on the average date from the date of the accident to the date of this judgment.

LIABILITY OF THE PARTIES

The three defendants charged with liability to the plaintiffs in this case are the two corporations, Kimberling Cove, Inc. and Recreation Unlimited, Inc., and Charles J. Dando in his individual capacity. The facts as to the relationship between these parties are as follows:

Kimberling Cove Marina, Inc. was incorporated for the express purpose of operating a marina on Tablerock Lake, and originally had a large number of stockholders. The United States Government owns the entire shore line of this lake and this property is administered by the Corps of Engineers. The Corps of Engineers leases part of this shore line for the express purpose of operating boat docks and marinas. In 1963 a prime lease agreement was entered into by some people named Powers and the Corps of Engineers for shore line property, which included the present location of the Kimberling Cove Marina. In 1964 a sublease, approved by the District Engineer, was entered into by certain individuals for the operation of the marine facilities. A subsequent assignee of this sublease incorporated Kimberling Cove Marina, Inc. and an assignment of the sublease to this corporation was approved by the District Engineer. The stock of Kimberling Cove, Inc. was offered for public purchase and at the time of this accident there were 120 shareholders.

On July 30, 1969 the defendant Dando and wife purchased the majority interest in this corporation. Mr. Dando became president. In July of 1970 the corporation borrowed $40,000.00 from the Small Business Administration, conveying a security interest in the corporation's sublease as part of the security for the loan. Shortly after this loan, around September 1, 1970, the Corps of Engineers, as part of a national policy, renegotiated all leases of this nature offering the lessees more advantageous rent-

als in order to make these marina operations more profitable. In this case the Corps required the prime lessee to renegotiate the sublease in order to share the increased profits with the sublessee. The sublease that was renegotiated named Mr. Dando, individually, as sublessee. This sublease contained a provision that the sublease could be assigned.

There was no release or cancellation of the former sublease to the corporation, and, under the terms of the security agreement, it could not be cancelled or assigned without the permission of the Small Business Administration. There is no question that, after the sublease was executed, the operations of the marina continued exactly as they had before, that is, as the business and property of the corporation, with the full knowledge and approval of the Corps of Engineers. There was a great deal of documentary evidence that the Corps of Engineers continued to refer to the subleessee as Kimberling Cove, Incorporated. For example, a policy of liability insurance (required by the sublease) in the name of the corporation was approved by the Corps, and the Corps audited the monthly statements of gross income which were signed by the corporation as sublessee. The title to all the personal property of the marina was in the corporation and was also pledged as security for the Small Business Administration loan to that corporation.

After Dando became president of the corporation, he determined to expand the business by sale of boats and marine equipment. However, his rental under the sublease was based on gross sales, which meant that he would have to pay a percentage of the sales price on these items as rent under the sublease. To avoid this, Dando incorporated Recreation Unlimited and that corporation built a large building very close to the marina but on private

property. This building contained a showroom for the boats and accessories and also apartments. Dando and his wife were the sole stockholders in this corporation and he was also president of it. Frank Clifton, the father of Scott Clifton, was vice president of both corporations but solely on the payroll of Recreation Unlimited. He did, however, oversee the manager of the marina whenever Mr. Dando was absent.

The boat driven by Scott Clifton at the time of the accident was owned by Recreation Unlimited, being part of its inventory held for sale. However, this boat was docked at the marina dock for rental use. Kimberling Cove rented the boat under an arrangement whereby it paid 60% of the rentals to Recreation Unlimited.

The business records of both corporations were in the same office in the Recreation Unlimited building and one bookkeeper handled all the books for both corporations.

The plaintiffs' contentions as to liability of each of these three defendants are based upon the following contentions:

1. The plaintiff charges Kimberling Cove, Inc. with negligent entrustment of the boat to Scott Clifton, who, because of his youth and inexperience, the defendant knew would be likely to use it in a manner involving unreasonable risk of physical harm to others whom the corporation should expect to be endangered by its use. This principle of liability is found in section 390, Restatement of the Law of Torts 2d. The facts on this issue are that Scott Clifton was employed in the summer of 1971 to work on the marina docks. He became 15 years of age three days before the accident. He had never operated boats of this type prior to that summer but did operate this particular boat to some extent and did instruct persons who rented the boat on

how to start it and operate it. There is no evidence that he was ever instructed in any manner in night operation of the boat or was ever given permission to operate it at night. There is no evidence from which the Court could find that he was either a skillful, well-instructed operator or that he had been a reckless or careless or incompetent operator on the previous occasions he had operated the boat. It is obvious that his experience in operating boats of this nature was very limited.

2. Plaintiff contends that Recreation Unlimited is liable on the theory that the operation of the marina and the renting of the boat was a joint enterprise of these two corporations, based on the facts that they had common officers, common offices and the close physical proximity of their physical facilities.

3. The plaintiff alleges that the defendant Dando is individually liable for the alleged negligent acts of the defendant Kimberling Cove under the principle found in Restatement of Torts 2d, section 428, which reads as follows:

> "An individual or corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of the contractor employed to do work in carrying out the activity."

Before determining the liability of each of these three defendants under the above theories of law and the facts of this case, it is necessary to determine what law governs. Fortunately, the Court of Appeals of this Circuit has directly passed upon this question in the case of *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973 (8th Cir. 1974). In that case the court held that the principle of liability for negli-

gent entrustment was applicable in an admiralty case. The court said at l.c. 980:

> "A Federal Court sitting in admiralty does not sit as a diversity court; therefore, this is not a case 'where state substantive law must be ascertained and applied.' . . . rather, admiralty suits are governed by federal substantive and procedural law. . . . However, a Federal Court sitting in admiralty need not 'invariably refuse to recognize and enforce a liability which the state has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action.' . . . Thus, admiralty courts may apply state law by express or implied reference or when the Federal law of admiralty is incomplete. . . . The Supreme Court has sustained the application of state laws which broaden the scope of liability beyond the general maritime standards. . . .
>
> "However, state law may not be applied by a Federal Court if it would defeat or narrow any substantial admiralty rights of recovery, either as created by Federal legislation or as defined by interpretive decisions of the Federal Court. . . . In addition, state law may not be applied to 'contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relationships.' . . . Even if state law does not contravene an established principle of admiralty, it may be deemed preempted if it is in direct contravention of the uniformity of the Admiralty Law in some crucial respect."

Missouri follows this principle of negligent entrustment as shown in the case of *Stafford* v. *Far-Go Van Lines, Inc.*, 485 S.W.2d 481 (K.C. Mo. App. 1972). That case

directly approved section 390 Restatement Torts 2d set out above. The *Stafford* case also cited with approval the cases of *Boland* v. *Love*, 222 F.2d 27 (D.C. Cir. 1955), and *Pierce* v. *Standow*, 329 P.2d 44 (Cal. App. 1958). Both of the latter cases are cases in which the defendant owner of an automobile did not authorize the use of the vehicle, and, in fact, had forbidden the use of the vehicle in the *Pierce* case but nevertheless entrusted the driver with the keys making it possible for him to operate the vehicle.

These cases are very close in point to the instant case. In this case Scott Clifton was permitted on several occasions, possibly as many as ten, to operate this powerful, fast boat, during daylight hours, while still 14 years of age. He had never been given permission to operate it at night, and, in fact, on the afternoon prior to the accident had been denied permission to operate it. However, he was entrusted with the key to unlock the boat house in which the keys to this boat and other rental boats were kept. Common knowledge of the natural inclinations of teenage boys to impress their teenage friends and to run fast, powerful boats convinces this Court that this constitutes an entrustment of the boat to Scott Clifon. The quesion, then, is whether his employer, who entrusted him with this key, knew, or had reason to know, that Scott Clifton, because of his youth, inexperience or otherwise, was likely to use it in a manner involving unreasonable risk of physical harm to others. The evidence showed that Scott Clifton, at the age of 14, had a very poor school record, having failed many subjects. This was a fact undoubtedly known by his father, who was the vice president of Kimberling Cove. This record would indicate, in itself, that he either had an inferior learning ability or that he had an attitude of inattention and nonapplication of his mental facilities. But, in addition to this, his

youth and inexperience in the operation of powerful boats of this kind, combined with the natural inclinations of boys of this age to "show off" and to travel at maximum speeds whenever possible, would in themselves supply the likelihood of unreasonable risk of physical harm from his operation of this boat, especially at night. The Court finds as a fact, under all the facts and evidence in this case, that the defendant Kimberling Cove, Inc. negligently entrusted this boat to Scott Clifton and, as a matter of law, is subject to liability for the physical harm suffered by these plaintiffs.

The plaintiff seeks to predicate the liability of the defendant Recreation Unlimited, Inc. on the theory that it was engaged in a joint enterprise with Kimberling Cove, Inc. in the operation of the marina, and more especially in the leasing of the boat in question. Most of the evidence on the joint enterprise theory is set out above. There is no evidence that there was any disregard of the separate corporate entities of these corporations by their common officers and directors. The records of each corporation were kept separately and accounts were maintained between them. There was obviously no ulterior motive such as fraud or deception in the operation of the two separate, independent, and noncompetitive businesses of these two companies. The arrangement for using this boat as a rental boat was a plain, straight-forward business transaction. Kimberling Cove docked the boat and rented it by the hour to customers who wanted a powerful speed boat for water skiing or sightseeing. It paid 60% of the gross rentals received to the owner of the boat, which presumably had the boat available for demonstration and sale to a prospective purchaser. The Court finds, as a mater of law, that this arrangement did not constitute a joint enterprise and that Recreation Unlimited, Inc. is not jointly liable for the negligent entrustment of the boat.

The Court finds the issue of limitation of liability under admiralty law in favor of Recreation Unlimited, Inc. and will enter a judgment against it for the stipulated value of the boat, which has been tendered into court.

This leaves the question of the liability of the individual defendant under plaintiffs' theory that Mr. Dando was the holder of a "franchise granted by public authority and which involves an unreasonable risk of harm to others" and is, therefore, subject to liability for physical harm caused to others by the negligence of the contractor employed to do work in carrying out the activity, as expressed in section 428 of Restatement Torts 2d set out above.

The alleged franchise is a sublease which was approved by the Corps of Engineers. It was shown from the evidence that the Corps of Engineers controls and limits the number of marinas located on Tablerock Lake through its ownership of the entire shore line. Unauthorized persons who attempt to build a marina on the shore line and engage in any of the ordinary operations of a marina, such as renting boats or renting dock space for boats or selling bait, are criminally prosecuted. Of course, all of these activities (excepting renting dock space) can be carried on by individuals on private property within a few hunded feet of the lake without restriction. The authorized marinas are located within a few miles of each other and operate competitively. This Court does not believe that a lease of land with the permission and authority to operate a marina could be classified as a franchise. However, the principle set out in the Restatement qualifies the word "franchise" by stating that it must be an activity "which involves an unreasonable risk of harm to others." There is no evidence from which this Court could find that the activity of oper-

ating a marina involves any unreasonable risk of harm to others so that even if the sublease could be found to be a "franchise granted by public authority," the principle of law stated in the Restatement would still not apply. All of the cases cited to this Court applying this theory are concerned with common carriers, either railroads or trucks operating under ICC or PSC permit.

Under the evidence in this case, the Court does not have to pass on the complex question of whether or not the sublease was still in the name of Kimberling Cove, Inc. because it had never been cancelled, or whether or not Kimberling Cove was still the sublessee because the Corps of Engineers had continually recognized it as the sublessee after the execution of the new sublease to Mr. Dando. The Court finds as a matter of law that the sublease did not constitute a "franchise granted by public authority which involved an unreasonable risk of harm to others" and, therefore, will enter judgment in favor of defendant Dando in this action.

At the trial of this case it developed that the corporate charter of Kimberling Cove, Inc. had been forfeited during the pendency of this action. A showing was made of the names of the last officers and directors in office when the forfeiture occurred. Upon inquiry from the Court, it developed that the attorneys representing Kimberling Cove, Inc. in this trial had been employed by the liability insurance carrier which covered that corporation at the time of this mishap. These attorneys stated that they had advised the last officers of the corporation of their right to employ counsel to assist in the defense of this case, and, in fact, they had urged them to do so, but had no response. There is no question, however, that they knew of the pendency of this action.

Missouri Civil Rule 52.13(e) provides that when a corporation has been sued and served with process or has appeared while in being, and is thereafter dissolved or its charter forfeited (the exact facts of this case):

> "The action shall not be affected thereby and any judgment obtained shall have the effect of a judgment against the directors and officers in office when any such dissolution or forfeiture occurs, in their representative capacity, although they were not joined in the action."

Under this clear rule and the undisputed facts as established in the record, the judgment against Kimberling Cove, Inc. should be a judgment against these officers and directors in their representative capacity.

The defendants raised the issue of contributory or comparative negligence on the part of the plaintiff Margaret Ann Pritchett and stressed her youth as part of this contention. As set out above, the Court found her without fault in this accident. The Court further finds that she became 18 years of age the day after the accident; that she had had an automobile driver's license for two years and was an experienced and competent driver; and that she had had experience in operating boats of this nature for over three years. There was absolutely no evidence that she had been anything but a careful pilot of the speed boat. The Court finds as a matter of law that the plaintiff Margaret Ann Pritchett was not guilty of any negligence of any type in the operation of her parents' boat at the time of this accident and further finds that there was no negligent entrustment of the boat to her by her parents.

In view of the above findings, the corporate cross-claims will be dismissed.

Counsel for plaintiffs are directed to prepare a form of final judgment and submit it to the Court, with copies to opposing counsel within ten days from this date.

/s/ Wm. R. Collinson
District Judge

Dated: 8/19/76

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

Civil Action No. 3122

In the Matter of the Complaint of RECREATION UNLIMITED, INC., owner of a 1971 Classic 170 Motorboat, No. 17071681, Missouri Registry No. MO 4164 GG, for Exoneration from or Limitation of Liability.

JUDGMENT

(Filed September 16, 1976)

The Court having found that Recreation Unlimited, Inc. is entitled to limit its liability under 46 U.S.C. §§ 183 to 189, and the parties having agreed that the value of the 1971 Classic 170 motorboat was Three Thousand Five Hundred ($3,500.00) Dollars, which amount was deposited herein in the form of a surety bond issued by The Fidelity and Casualty Company of New York, as Surety, the Court does hereby award Claimants Joseph H. Pritchett and Vivian M. Pritchett the sum of TWO HUNDRED SIXTY-ONE Dollars and TWENTY-EIGHT Cents ($261.28), awards Claimant Margaret Ann Pritchett the sum of THREE THOUSAND ONE HUNDRED TWENTY-SEVEN Dollars and EIGHTY-EIGHT Cents ($3,127.88), awards Claimant Mike Oldham the sum of SEVENTY-EIGHT Dollars and NINETEEN Cents ($78.19) and awards Claimants Charles J. Oldham and Roma M. Oldham the sum of THIRTY-TWO Dollars and SIXTY-FIVE Cents ($32.65), the amounts awarded aggregating THREE THOUSAND FIVE HUNDRED ($3,500.00) Dollars, and Recreation Unlimited, Inc. or its said Surety is ordered to pay the said amounts as awarded. Judgment is hereby entered in

favor of the said Claimants in the indicated amounts against Recreation Unlimited, Inc.

All costs herein are taxed against Recreation Unlimited, Inc.

Upon payment of costs and the filing of Receipts showing payment of the amounts awarded, the said Surety shall be discharged.

Done this 16th day of September, 1976.

/s/ Wm. R. Collinson
William R. Collinson
District Judge